

**Bauer v Chirichella**

2011 NY Slip Op 30129(U)

January 20, 2011

Sup Ct, Wayne County

Docket Number: 68145/2010

Judge: Dennis M. Kehoe

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STATE OF NEW YORK  
SUPREME COURT COUNTY OF WAYNE

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NICOLA M. BAUER,  
Plaintiff,

DECISION

-vs-

JESSICA CHIRICHELLA and MICHAEL J.  
CHIRICHELLA,  
Defendant

Index No. 68145

2010

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Stanley Law Offices, LLP  
Keith R. Young, Esq., of Counsel  
Attorney for Plaintiff

Law Offices of Mary Audi Bjork  
Barney F. Bilello, Esq., of Counsel  
Attorneys for Defendants

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The Defendants have moved pursuant to CPLR §3212 for an Order granting summary judgment against the Plaintiff Nicola M. Bauer and dismissing the Complaint in the above personal injury action. The Defendants' motion is based on the assertion that Plaintiff Nicola M. Bauer has failed to demonstrate that she suffered a serious injury as that term is defined under New York State Insurance Law §5102. Alternatively, the Defendant asserts that, even if the Plaintiff is able to make a prima facie showing of a serious injury, she has failed to present sufficient evidence to indicate that the subject accident caused or contributed to her alleged

condition. The Plaintiff has opposed the Defendants' motion, and has filed a Cross-Motion seeking an order granting summary judgment against the Defendants on the issues of serious injury and negligence. (The Court notes that the third party action brought by the Defendants against the Plaintiff's husband has been discontinued, indicating that negligence is no longer an issue, and that the Plaintiff is entitled to summary judgment as to negligence as a matter of law.)

Under CPLR §3212(b), a summary judgment motion requires a court to determine whether the cause of action, counterclaim, or defense at issue requires a trial before it can be sustained or rejected. On a defendant's motion for summary judgment the supporting papers must establish a prima facie case for dismissal, through evidence in admissible form, (See, e.g. *Rampello v Ferguson*, 280 AD2d 986 (4<sup>th</sup> Dept, 2001)). Should a defendant make such a showing, the burden then shifts to the plaintiff to come forward with sufficient evidence to defeat the defendant's motion, by demonstrating the existence of an issue of fact as to whether plaintiff did sustain a serious injury as defined by the Insurance Law. (*Gaddy v Eyster*, 79 NY2d 955 (1992)). However, should a defendant fail to meet that initial burden, then the Court need not consider the sufficiency of

plaintiff's papers. (*Byrnes v Hertz Corp.*, 278 AD2d 867 (4<sup>th</sup> Dept, 2000)).

The Plaintiff's claim arises from a motor vehicle accident, which occurred on July 9, 2006, near the intersection of Route 32-S and Smith Clove Road in Central Valley, Orange County, New York. The Plaintiff was a passenger sitting in the rear of a vehicle driven by her husband, Frederick T. Bauer. It is not disputed that the Defendant Jessica Chirichella attempted to make a left hand turn into a parking lot, turning directly into the path of the oncoming Bauer vehicle.

In her pleadings, the Plaintiff alleges that she sustained numerous physical injuries as a result of the accident, including a closed head injury, indicated by bruises on her forehead, accompanied by head pain. Some five months after the accident, the Plaintiff allegedly began experiencing symptoms such as memory loss, vertigo, and unpleasant sensory sensations. The Plaintiff was ultimately found to be suffering from a complex partial seizure disorder, which is now controlled by medication. The Plaintiff maintains that , based on these injuries, she has suffered a serious injury as defined by Insurance Law §5102(b), to wit:

permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function

or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

(NOTE: The Defendant has argued, and the Court concurs that, as the Plaintiff has not addressed the "90/180" issue in her motion papers, any claim under that subsection is hereby deemed waived.)

In support of the motion, the Defendant has submitted a portion of the transcript of the Plaintiff's deposition testimony, the reports of the Plaintiff's treating physicians, specifically, Gene Tolomeo, M.D., neurologist; A. James Fessler, M.D. at the Strong Epilepsy Center; and Philip D. Vitticore, M.D., neurologist; and the results of numerous diagnostic tests, including brain CT scan, brain MRI, EEG and 24 hour ambulatory EEG. Based on these records, the Defendant maintains that there is no objective evidence that Plaintiff sustained a serious injury. Rather, the Defendant argues that, while the Plaintiff may have experienced subjective complaints, all of the above test results were negative or inconclusive, and none of her treating physicians could

establish the etiology of her disorder. Nor, argue the Defendants, can the Plaintiff demonstrate the “significance” of the alleged injury in terms of “both degree and duration”. (See, e.g. *Mejia v DeRose*, 35 AD3d 407 (2<sup>nd</sup> Dept, 2006)).

Based on the above allegations, the Court finds that the Defendants have met their initial burden of proof as to the alleged absence of an objective serious injury as defined by the Insurance Law. Further, even if the Plaintiff is found to have suffered such an injury, the Defendants have also raised an issue as to whether the Plaintiff’s condition has been shown to be causally related to the accident. Therefore, as the Defendants have met their initial quantum of proof, the burden now shifts to Plaintiff to come forward with sufficient competent medical evidence, based on objective findings, to raise an issue that, as a result of the accident, Plaintiff did suffer a serious injury which meets the statutory definition. (*Barbagallo v Quackenbush*, 271 AD2d 724 (3<sup>rd</sup> Dept, 2000)).

In response to the Defendants’ motion, the Plaintiff has submitted a transcript of her entire deposition testimony, and an evaluation dated September 10, 2010 and affirmed under penalty of perjury, from Ronald A. Naumann, M.D., a neurosurgeon. In his report, Dr. Naumann concludes

that the Plaintiff suffers from “post-traumatic epilepsy” and that “(the Plaintiff’s) seizure disorder is entirely causally related to her MVA of July 9, 2006....” He also states that her condition “could be permanent”, and that she retains a “mild-to-moderate partial disability”. He maintains that the Plaintiff must continue to be “religious about taking her medication as prescribed.” In addition, the Plaintiff maintains that, in any event, she is not required to show a serious injury, due to the fact that she seeks monetary relief in excess of the statutory basic economic loss figure of \$50,000.00, given the fact that she will continue to incur medication expense at the rate of \$186.26 per month, with a life-expectancy of 28.2 years.

As counsel for the Plaintiff argues in his Memorandum of Law, at this stage of the proceedings, the Plaintiff only needs to establish that her “... proffered evidence raises questions of material fact as to whether she sustained a (serious injury).” (*Toure v Avis Rent a Car Systems, Inc.*, 98 NY2d 345 (2002)). The Defendants’ reliance on the records of the Plaintiff’s treating physicians, and the absence of an IME evaluation, do not preclude the granting of summary judgment to the Defendants. However, the Court finds that Dr. Naumann’s unequivocal statement that the Plaintiff suffers from a seizure disorder which is causally related to her accident, is

sufficient to create a triable issue of fact. This conclusion is supported by statements made by the Plaintiff's treating physicians in their respective evaluations. Specifically, Dr. Tolomeo's notes of February 19, 2007 include an observation that he could not "completely rule out that the trauma from (the Plaintiff's) car accident caused the seizure focus...." He also stated in a letter dated September 9, 2008 that "it is possible that the seizures were caused by the motor vehicle accident." Finally, a letter dated January 20, 2009 from Dr. Vitticore states that "the timing of seizure onset suggests that the head trauma could possibly (or probably) be the cause (of the complex partial seizures)." Based upon the record as a whole, the Court concludes that both the seriousness of the Plaintiff's condition and the causal relationship to the accident should be determined at trial. (As to the issue of basic economic loss, the Court makes no determination as to the validity of Plaintiff's claim under this theory. The existence of an issue of fact regarding serious injury renders such consideration unnecessary at this time.)

The Court recognizes that the Plaintiff may face difficulties at trial in proving both objective injury and causality. However, the Court finds that, based on a review of the records and reports submitted, such

determination should be left to the jury. The Defendants' motion for summary judgment is therefore denied. The Plaintiff's cross-motion for summary judgment on the issue of serious injury is also denied. Counsel for the Plaintiff shall submit an order in accordance with the Courts decision.

Dated: January 20, 2011  
Lyons, New York



Honorable Dennis M. Kehoe  
Acting Supreme Court Justice

WAYNE COUNTY COURT  
SUPREME AND COUNTY COURT  
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